89-1875 (1)

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CITY OF SANTA ANA,
Petitioners,

VS.

DALE CONNER and LINDA CONNER,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a warrant necessary to abate a declared public nuisance in a citizen's back yard after two years of notice, Pre-abatement Administrative Hearings and Appeals Procedures?

2. Should police officers who abate a declared public nuisance in a back yard, without a warrant, have qualified immunity when no state or local law required a warrant, no specific case law required the warrant, and where two Federal Judges concluded that a warrant was not required?

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Defendant, **CITY OF SANTA ANA, et al.**, the Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 1, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 897 F.2d 1487 (9th

Circuit 1990) and is printed in Appendix A hereto, infra, page A3. The judgment of the United States Court of Appeals of the Ninth Circuit is printed in Appendix A hereto, infra, page A3.

The opinion of the United States District Court, Central District of California, is printed in Appendix B hereto, infra, page B11.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit (Appendix A, infra, page A3) was entered on March 1, 1990. The jurisdiction of the Supreme Court is invoked under 28 USCS Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the first section of the Fourth Amendment to the Constitution of the United States, which provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On July 1, 1983 petitioners City of Santa Ana and its officials notified respondents Dale and Linda Conner of the City's intention to abate and remove five old and inoperable "junk" vehicles stored in the Conners' back yard. The Conners thereafter asked for and received a hearing from the police department. The Police Depart-

ment Hearing Officer found that the automobiles constituted a public nuisance and that they should be abated. The Conners appealed this determination to the Santa Ana City Council. The City Council appointed a Hearing Officer to receive evidence and statements and to file a recommendation. The Hearing Officer upheld the reasonableness of the police actions but recommended a 30 day extension of time in which the Conners could prove the automobiles were operable. On February 19, 1985, the City Council adopted the Hearing Officer's recommendation, except that it rejected the recommended 30 day extension of time. However, no attempt was made to abate the subject vehicles until June 7, 1985 and in the interim, the Conners failed to voluntarily abate the vehicles.

On June 7, 1985 City Officials, without warrant, entered the back yard of the Conner property and removed two of the vehicles from the property. The removal of the two vehicles required the taking down of a fence surrounding the back yard of the Conner property.

The Conners brought suit under 42 *U.S.C.* section 1983 contending, among other things, that the warrantless entry to remove the vehicles constituted an unlawful search and seizure and invaded their privacy.

On August 12, 1987 the District Court granted the petitioners' motion for summary judgment as to the entry and seizure of June 7, 1985 stating that:

> "when the public officials entered the plaintiffs' back yard to abate a known, visible, nuisance after first conducting the extensive pre-abatement procedure used here, they did not commit an illegal search and seizure."

In addition, the District Court determined that the individual defendants were entitled to qualified immunity

from liability for the entry and seizure of June 7, 1985. Plaintiffs, respondents herein, appealed both decisions.

On March 1, 1990 the United States Court of Appeals for the Ninth Circuit, in a case of first impression, found that regardless of how reasonable the warrantless entry and seizure appeared in light of the extensive pre-seizure process, the entry and seizure of June 7, 1985 nevertheless violated the Fourth Amendment. The Court of Appeals also reversed the District Court's granting of qualified immunity to all individual defendants stating that it was difficult to understand how the law requiring a warrant was anything less than clear.

REASONS FOR GRANTING THE WRIT

A. A Reasonable Seizure of a Declared Public Nuisance Should Not be Held Unconstitutional Merely Because of the Lack of a Warrant.

The Court of Appeals ignored the standard of reasonableness when it determined the constitutionality of the entry into the Conners back yard to seize the abandoned vehicles.

The Fourth Amendment prohibits only "unreasonable searches and seizures." However, the Court of Appeals specifically stated that the entry and seizure herein violated the Fourth Amendment "... regardless of how reasonable the warrantless search and seizure appeared in light of the pre-seizure process afforded the Conners." As stated by dissenting Circuit Judge Trott, this reasoning completely ignores the text of the Fourth Amendment, its purpose, and the time honored method of determining which warrantless searches and seizures are "reasonable".

The majority opinion focused solely on the singular issue of whether or not the police had a warrant without considering the question of whether or not the values to be protected by the Fourth Amendment have been disturbed. The court's fixation on whether or not a warrant existed provides an easy answer but ignores the purpose of the Fourth Amendment and contains no analysis of the reasonableness of the entry and seizure.

The entry and seizure did not violate the Conners' reasonable expectation of privacy. The Conners had notice in July of 1983 of the City's intention to abate the vehicles. The Conners contested the need and propriety for abatement through adversarial Pre-abatement Hearings. The Conners appealed the rulings unsuccessfully and thereafter chose not to seek review in the California Superior Court. Thereafter, the Conners had the opportunity to voluntarily abate the declared nuisance but elected not to do so. It was only then that the entry and seizure was made and it cannot be said that this entry and seizure was unexpected or that any reasonable privacy interests remained.

The Fourth Amendment not only protects ones reasonable expectation of privacy but also prohibits arbitrary invasions by governmental officials. *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967). The entry and seizure herein was not arbitrary. The extensive Pre-abatement Procedures not only gave the Conners actual notice of the City's intentions but also an ample opportunity to fully contest the propriety of the proposed abatement before a detached and impartial hearing officer. Indeed, the majority opinion does not even suggest that the entry and seizure was arbitrary. Rather, the majority opinion expresses concern over the fact that the entry and seizure of

the Conners' property occurred without any formal judicial authorization.

The mere absence of judicial authorization (a warrant) does not make the entry and seizure unconstitutional per se and certainly does not make it unreasonable. That the Pre-abatement Hearings constituted an adequate buffer between the Municipal Police Officers and the Conners cannot be more adequately stated than by dissenting Judge Trott:

> "There is nothing in the record to suggest that the City Council-which is part of the Legislative, not Executive, branch of government was anything but competent, impartial, neutral and detached. The hearings before the City Council most assuredly constituted an adequate buffer between the Municipal Police Officers and the Conners. For all practical purposes, the conclusion that a nuisance existed in violation of Municipal Law, and was therefore subject to abatement pursuant to the governmental power of the municipality, was judicial determined."

In addition, the "judicial authorization" sought by the majority, that is, a warrant, would have provided no more protection of the Conners' Fourth Amendment Rights than the extensive Pre-abatement process. The Conners took advantage of their right to contest the need and propriety of the proposed abatement in an adversarial hearing process whereas an application for a search warrant is ex parte.

In summary, and as stated by dissenting Judge Trott, the majority's opinion elevates form over substance by failing to consider the reasonableness of the entry and seizure or whether it violated the purpose or the values to be protected by the Fourth Amendment.

B. Requiring A Judicial Authorization Of An Abatement Determination Would Impose Untoward Burdens Upon Local Governments As Well As The Courts.

The regulation or prohibition of public nuisances is an important and necessary exercise of a municipality's police power. Interfering with efficient governmental operations by burdening it with an additional judicial process without analyzing the reasonableness of the conduct is again elevating form over substance. The judicially imposed requirement of a warrant under the circumstances of this case will clearly reduce the efficiency of Local Governments in abating public nuisances and in some cases will actually prevent abatement. Public entities already have limited resources with which to regulate and prohibit nuisances.

C. Qualified Immunity Should Be Granted Where No State Or Local Law Required A Warrant, No Specific Case Law Required A Warrant, And Where Two Federal Judges Conclude That A Warrant Is Not Required.

In this case the Santa Ana Municipal Code gave the individual defendants (petitioners herein) the authority to do exactly what they did; that is, enter a back yard without a warrant and seize vehicles which had been declared a nuisance.

It is inappropriate to subject police officers to a civil trial wherein punitive damages are requested against them because they allegedly failed to know "clearly established law" when there is an absence of specific case law prohibiting their acts, the State and Local laws permit the alleged unconstitutional acts, and two Federal Judges have concluded that the officers' actions were in fact

constitutional. If two Federal Judges have concluded that the actions of the City Officials were constitutional how can the same City Officials be held liable for not knowing that their actions were in fact clearly unconstitutional.

CONCLUSION

Wherefore, petitioners pray that a writ of certiorari issue from this honorable court to review the judgment of the United States Court of Appeals for the Ninth Circuit. In the event that the petition is granted, petitioners pray that the judgment of the court below be reversed.

DATED: May 29, 1990

KINKLE, RODIGER & SPRIGGS

By: _____

A. J. PYKA,
Attorney for Defendants,
CITY OF SANTA ANA

Appendix A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DALE CONNER; LINDA CONNER,
Plaintiffs-Appellants/Cross-Appellees,

vs.

CITY OF SANTA ANA; ROBERT C. BOBB;
EDWARD J. COOPER; RAYMOND C. DAVIS;
C.R. MILLER, et al.,
Defendants-Appellees/Cross-Appellants.

Nos. 87-6683, 88-5510, 88-5511, 88-5512, 88-5536

D.C. No. CV-85-7918-FFF

OPINION

Appeal from the United States District Court
for the Central District of California
Ferdinand F. Fernandez, District Judge, Presiding

Argued and Submitted
May 2, 1989—Pasadena, California

Filed March 1, 1990

Before: Cecil F. Poole, Robert R. Beezer and
Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer; Dissent by Judge Trott

SUMMARY

Constitutional Law/Search and Seizure/Immunity

Affirming in part, and reversing and remanding in part, the court held that the fourth amendment protects citizens from a city's warrantless entry onto their proper5ty and from warrantless siezure of their automobiles even if the automobiles have been declared a public nuisance.

After appellant City of Santa Ana police were advised that appellees Dale and Linda Conner were storing several old and inoperable automobiles on their property, the police investigated on July 1, 1983. Without a warrant and without the Conners' permission, the police scaled the Conners' fence and inspected the automobiles. That same day, the City mailed to the Conners notice of its intention to abate and remove the automobiles. The Conners asked for and received a hearing from the police department, at which the hearing officer found that the automobiles constituted a public nuisance and should be abated. On appeal to the City Council, a hearing officer upheld the reasonableness of the police actions, but recommended that the Conners be given a thirty-day extension of time in which the Conners could prove that the automobiles were operable. The City Council accepted this recommendation, but rejected the extension of time. On June 7, 1985, the police called defendants California Towing and A & P Towing to the Conners' property, and city officials, again without a warrant, broke down the Conners' fence and removed two of the vehicles which were hauled away and destroyed. The Conners brought a 42 U.S.C. § 1983 action against all persons involved in the searches, seizures, and towing of their automobiles. The district court granted summary judgment to the Conners against

the City, but granted qualified immunity to all non-municipal defendants on the claim based on the July 1, 1983 entry and to all defendants on the June 7, 1985 warrantless seizure.

[1] The City did not appeal the grant of summary judgment against it for the warrantless entry on July 1, 1983. [2] However, the Conners appealed the district court's holding that the second entry onto the Conners' property was reasonable and did not require a warrant because it was preceded by numerous hearings and appeals. [3] Entry to abate a nuisance falls within the warrant requirement of the fourth amendment. California courts have rejected, for purposes of the warrant requirement, any distinction between inspection and abatement of a declared public nuisance. Furthermore, the Supreme Court has held in other contexts that a warrant is required for entry even after a violation of law is established. [4] The abatement hearings in this case established only the validity of the seizure. The district court found, in imposing a warrant requirement for the first search, that the Conners had a legitimate expectation of privacy in their enclosed, fenced yard. That expectation of privacy remained the same before and after the hearings.

[5] Qualified immunity from suit must be granted when the law allegedly violated is not clearly established. The district court concluded that the law was not clearly established because the municipal code seemingly authorizes the warrantless searches and seizures. However, the court found that the municipal code does not state that warrants are not required and that it was difficult to understand how the law requiring a warrant was anything but clear. Qualified immunity was erroneously granted to the non-municipal defendants. The reasonableness of

their actions is a question for the jury. The court concluded that the Conners' fourth amendment claim may proceed to trial against all defendants.

Judge Trott, in a separate opinion, dissented, stating that he respectfully believed that the majority opinion elevates form over substance. Guided by the text of the fourth amendment, its purpose, and the time honored method of determining which warrantless searches and seizures are reasonable, he found no unreasonable search or seizure with respect to the warrantless entry after pre-abatement adversary hearings.

COUNSEL

William A. Snyder, Mission Viejo, California, for the plaintiffs-appellants/cross-appellees.

Gayle K. Tonon, Kinkle, Rodiger & Spriggs, Santa Ana, California, and Brian M. Brown, Tustin, California, for the defendants-appellees/cross-appellants.

OPINION

BEEZER, Circuit Judge:

These consolidated appeals stem from the City of Santa Ana's removal of automobiles from the Conners' private property after the Santa Ana City Council determined that the automobiles constituted a public nuisance. The parties appeal and cross-appeal from the judgment, grants of summary judgment, the granting of permanent injunctive relief, and from the award of attorneys fees. We affirm in part and reverse in part.

City of Santa Ana police were advised that the Conners were storing several old and seemingly inoperable automobiles on their property. Believing that the automobiles

may have constituted a public nuisance under the Santa Ana County municipal code,[1] the police investigated on July 1, 1983. Without a warrant and without the Conners' permission, the police scaled the fence on the Conner property and inspected the automobiles. The police inspected the vehicles and recorded the Vehicle Identification Numbers (VIN) and license plate numbers from the automobiles. That same day the City mailed to the Conners notice of its intention to abate and remove the automobiles. Pursuant to § 16-118 of the municipal code, the Conners asked for and received a hearing from the police department. The police department hearing officer found that the automobiles constituted a public nuisance, and that they should be abated. Pursuant to § 16-120 of the municipal code, the Conners appealed this determination to the Santa Ana City Council. The City Council appointed a hearing officer to receive evidence and statements and to file a recommendation. The hearing officer upheld the reasonableness of the police actions but recommended a thirty-day extension of time in which the Conners could prove the automobiles were operable. On February 19, 1985, the City Council adopted the hearing officer's recommendation, except that it rejected the recommended thirty-day extension of time.

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[1]Santa Ana Municipal Code § 16-110, et seq. contains the nuisance ordinance at issue. Section 16-116 provides:

> Authority to cause abatement and removal.
>
> Upon discovering the existence of an abandoned, wrecked, dismantled, or inoperable vehicle, or parts thereof, on private property or public property within the city, the chief of police or his designee shall have the authority to cause the abatement and removal thereof in accordance with the procedure prescribed herein and to arrange with and authorize private persons or city employees to accomplish such removal.

On June 7, 1985 the police called defendants California Towing and A & P Towing[2] to the Conners' property. City officials, again without a warrant, broke down the fence surrounding the Conner property and removed two of the vehicles from the property. The vehicles were hauled away and later destroyed.

The Conners brought this suit under 42 U.S.C. § 1983[3] against all persons involved in the searches, seizures, and the towing of their automobiles. The Conners' claims were based upon the warrantless searches and seizures and on the denial of due process. The district court granted summary judgment to the Conners against the City on the July 1, 1983 warrantless search and seizure. All non-municipal defendants were granted qualified immunity with regard to the claim based upon the July 1, 1983 entry. Summary judgment was granted to all defendants on the June 7, 1985 warrantless seizure. The district court granted summary judgment against the Conners on each of their due process claims. The question of damages for the City's unconstitutional July 1, 1983 warrantless search went to the jury and resulted in damages of $71,000.00. The district court also granted injunctive relief prohibiting further warrantless entries onto the Conner property. The Conners' attorney was awarded fees pursuant to 42 U.S.C. § 1988. These appeals and cross-appeals followed.

The grant or denial of summary judgment is a question of law reviewed de novo. *Darring v. Kincheloe*, 783 F.2d 874, 876 (9th Cir. 1986).

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[2]A & P settled before trial.

[3]The Conners do not appeal from the dismissal of their § 1985 and § 1986 claims.

Search and Seizure

[1] It is clear that the warrant requirement of the fourth amendment[4] applies to entries onto private land to search for and abate suspected nuisances. *Michigan v. Tyler*, 436 U.S. 499, 504-07 (1978); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). On the strength of those cases, the district court granted the Conners' summary judgment motion against the City of Santa Ana as to the July 1, 1983 warrantless entry. The City does not appeal from this grant of summary judgment.

[2] The district court concluded, however, that the warrantless seizure of the automobiles on June 7, 1985, did not violate the fourth amendment. The court held that the second entry onto the Conners' property was reasonable and did not require a warrant because it was preceded by numerous hearings and appeals. The court stated: "it is surely not reasonable to require a warrant to abate every nuisance . . . where the citizens involved have already had a full and fair procedure wherein they had the opportunity to contest the need and propriety of the abatement in their specific case." We disagree.

[3] Entry to abate a known nuisance falls within the warrant requirement of the fourth amendment. In *Michigan v. Tyler,* 436 U.S. 499 (1978), the Supreme Court stated:

> The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court,* 387 U.S. 523, 528, the

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[4]As applied to the states via the fourteenth amendment.

> "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to *locate and abate* a suspected public nuisance, or simply to perform a routine periodic inspection. The privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See v. Seattle,* 387 U.S. 541; *Marshall v. Barlow's Inc.,* [436 U.S.307], at 311-313. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

436 U.S. at 504-505 (emphasis added). We do not agree that *Tyler* can be distinguished on the ground that it endorses a warrant requirement only for abatement of *suspected* nuisances. California courts have rejected, for purposes of the warrant requirement, any distinction between inspection and abatement of a declared public nuisance. In *Gleaves v. Waters,* 175 Cal.App.3d 413, 220 Cal.Rptr. 621 (1985), the court held that, absent exigent circumstances, "officials engaged in the abatement of a public nuisance must have a warrant" to enter an enclosed backyard; "it is the prospective invasion of constitutionally protected interests by an entry onto property and not the purpose of the entry which calls forth the warrant requirement." 220 Cal.Rptr. at 623 at 625. Furthermore, the Supreme Court has held in other contexts that a warrant is required for entry even after violation of a law is established. In *G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977), the Court held unequivocally that non-exigent, warrantless entry onto a taxpayer's private property to seize assets in satisfaction of *assessed* tax deficiencies violates the warrant requirement of the fourth amendment. *Id.* at 354.

The City next argues that the second entry was reasonable and no warrant was required. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. The Supreme Court has instructed that:

> In construing this command [of reasonableness], there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."

Cady v. Dombrowski, 413 U.S. 433, 439 (1973) (quoting *Camara v. Municipal Court,* 387 U.S. at 528-29). *See also Katz v. United States,* 389 U.S. 347, 356-57 (1967) ("Over and over again this Court has emphasized that the mandate of the [Fourth] Amendment required [that] . . . searches conducted outside the judicial process . . . are *per se* unreasonable . . . subject only to a few specifically established and well-defined exceptions.") (citation omitted). The City of Santa Ana does not contend that the June 7 search of the Conner property falls within any of the "carefully defined classes of cases" which permit warrantless searches or seizures.[5] Instead, the City ar-

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[5]For a discussion of the exceptions to the fourth amendment warrant requirement, (e.g., warrantless entry justified by an emer-

gues that it afforded the Conners sufficient "process" to make proper under the fourth amendment the warrantless entry onto, and subsequent seizure of, the Conners' property.

We are unable to agree. Neither *Tyler* nor any case of which we are aware has created a "process" exception to the warrant requirement. The taxpayer in *G.M. Leasing,* for example, had numerous opportunities both before and after the taxes were assessed to rectify errors in the amount of the assessment, but the availability of such process to the taxpayer played no role in the Court's straightforward application of the fourth amendment to the warrantless seizures there at issue. *See* 429 U.S. at 341, 342 n. 5. On the contrary, the Court held that the validity of the tax assessments established only probable cause for the seizures and did *not* establish the reasonableness of entry onto private property without a warrant. *Id.* at 358 (recognizing tax statute as "an authorization for all forms of *seizure,* but as silent on the subject of intrusions into privacy") (emphasis in original).

[4] Similarly, the abatement hearings here established only the validity of the seizure. The district court found, in imposing a warrant requirement for the first search, that the Conners had a reasonable expectation of privacy in their enclosed, fenced yard. That expectation of privacy remained the same before and after the hearings. As the *G.M. Leasing* Court remarked:

> It is one thing to seize without a warrant property resting in an open area or *seizable by levy* without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property . . . situated

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gency such as a fire) *see, e.g., United States v. Device, Labeled Theramatic,* 641 F.2d 1289, 1294-95 (9th Cir. 1981).

> on private premises to which access is not otherwise available for the seizing officer.

Id. at 354 (emphasis added).[6] *Cf. Michigan v. Clifford,* 464 U.S. 287, 292-93 (1984) (reasonable privacy expectation remains in fire-damaged premises, even when occupancy is impossible).

We concloude that the fourth amendment protected the Conners from the City's warrantless entry onto their property and from the warrantless seizure of their automobiles. The warrant requirement applied to the City when, without the Conners' consent, it broke down their fence, entered their property and seized the automobiles, regardless of how "reasonable" the warrantless search and seizure appeared in light of the pre-seizure process afforded the Conners. Because a search and seizure of the Conners' property occurred without any judicial authorization, the district court erred in granting summary judgment against the Conners for their claim based on the June 7, 1985 warrantless search and seizure. Accordingly, the grant of summary judgment is reversed and the case remanded for trial on that claim.[7]

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[6] The *G.M. Leasing* Court upheld a warrantless seizure of the taxpayer's automobiles because they were seized "on public streets, parking lots, or other open places, and did not involve an invasion of privacy." 492 U.S. at 351. By contrast, the Conners' automobiles were seized from their fenced, private property.

[7] Our holding that a warrant was required necessarily rests upon the absence of a judicial writ enforcing the City Council's nuisance determination. *G.M. Leasing,* 429 U.S. at 355-56 n. 20 (indicating that entry onto private land authorized by judicial writ is without the warrant requirement of the fourth amendment). *See also Shadwick v. City of Tampa,* 407 U.S. 345, 348-49 (1972), allowing magistrate to qualify as judicial officer, even if not a lawyer, so long as that person was neutral and detached, but noting: "The very term 'judicial officer'

Qualified Immunity

[5] The district court granted qualified immunity to all defendants except the City of Santa Ana. Qualified immunity from suit must be granted when the law allegedly violated is not clearly established. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In this case the district court concluded that the law was not clearly established because the municipal code seemingly authorized the warrantless searches and seizures. First, the municipal code does *not* state that warrants are not required.[8] Second, in light of *Tyler* it is difficult to understand how the law requiring a warrant was anything less than clear. Qualified immunity was erroneously granted to the non- municipal defendants.[9] The reasonableness of the non- municipal defendants' actions is a question of fact for the jury. *Benigni v. City of Hemet,* 868 F.2d 307, 313-14 (1989), *amended in unrelated part,* No. 87-5622 slip op. (9th Cir. June 15, 1989); *Brady v. Gebbie,* 859 F.2d 1543, 1556 (9th Cir. 1988), *cert. denied,* 109 S. Ct. 1577 (1989). Accordingly, the Conners' fourth amendment claim may proceed to trial against all defendants.

Due Process

The Conners make several arguments that the defendants deprived them of their property without due process. The district court granted summary judgment against the Conners on their due process claims. We affirm.

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[8]In fact, the California Code sets out the procedures for obtaining a warrant for inspecting nuisances. Cal. Civ. Pro. Code § 1822.50, et. seq.

[9]Defendant California Towing's grant of qualified immunity must also be reversed as private parties acting under color of state law are not entitled to the qualified immunity defense. *F.E. Trotter, Inc. v. Watkins,* 869 F.2d 1312, 1318-19 (9th Cir. 1989).

The Conners first argue that they were deprived of due process because there was no judicial involvement in the process depriving them of their automobiles. We reject this argument. The fundamental requirements of procedural due process are notice and an opportunity to be heard before the government may deprive a person of a protected liberty or property interest. *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). There is no requirement, however, that a court must be involved in the process in order to comply with the constitution. *Jordan v. City of Lake Oswego,* 734 F.2d 1374, 1376 n. 1 (9th Cir. 1984) ("There is no constitutional requirement that the decisionmaker be an involved person when a property interest protected by due process is at stake."); *Price v. City of Junction, Texas,* 711 F.2d 582, 589 n. 5 (5th Cir. 1983) ("There is no requirement that the impartial tribunal be a judicial tribunal."); *Stretten v. Wadsworth Veterans Hospital,* 537 F.2d 361, 369 n. 18 (9th Cir. 1976) (same). *See also Schweiker v. McClure,* 456 U.S. 188 (1982) (judicial involvement not required to meet the due process demand of an impartial tribunal). The Conners were afforded notice and several opportunities to be heard before their automobiles were seized by the City. Moreover, the Conners did have a right to judicial review of the City Council's action under Cal. Civ. Pro Code § 1094.5, a right which they did not exercise.

The Conners next argue that the municipal ordinance authorizing seizure of the automobiles constitutes an unconstitutional exercise of the City's delegated police power. This argument is meritless. The ordinance was authorized by state law and was within the police powers of the state. Cal. Gov't Code §§ 38771, 38773.5; Cal. Veh. Code § 22660 (authorizing municipal ordinances pertaining to inoperative vehicle nuisances); *Price,* 711 F.2d at

589 (dismissing a nearly identical argument). *See also* 6A *McQuillen Mun. Corp.*, § 24.28 (3rd ed. 1988).

The Conners next argue that they were denied the process because they were entitled to a jury trial on the question of whether the automobiles constituted a nuisance. They rely on *People v. One 1941 Chevrolet Coupe*, 37 Cal.2d. 283, 231 P.2d 832 (1951). Their reliance is misplaced. *One 1941 Chevrolet Coupe* involved a *criminal* forfeiture proceeding and the court held that the right to a jury trial therefore attached. The City was proceeding to abate a nuisance; it was not proceeding under a criminal forfeiture statute. Therefore, a jury was not required to determine whether the Conners' automobiles constituted a nuisance under the City code. *Cf. One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965) (noting that forfeiture actions are quasi-criminal in nature).

Finally, the Conners contend that they were deprived of due process because illegally seized evidence — the vehicle identification numbers — was used as evidence in the pre-seizure hearings. We reject this argument. *See INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (confession obtained in violation of fourth amendment not excludable in a civil deportation hearing); *United States v. Janis*, 428 U.S. 433 (1976) (fourth amendment did not require exclusion of illegally seized evidence in a civil tax enforcement case).

Accordingly, the district court correctly granted summary judgment against the Conners on their due process claims.

Damages

The City challenges the sufficiency of the evidence on the issue of damages. An award of damages will be upheld

if supported by substantial evidence and will not be disturbed unless it is clearly unsupported by the evidence. *LuMetta v. U.S. Robotics, Inc.*, 824 F.2d 768, 770 (9th Cir. 1987). We have reviewed the trial record and conclude that the amount of damages awarded by the jury is supported by sufficient evidence. Accordingly, we affirm the damages awarded.

Injunctive Relief

The district court granted the Conners permanent injunctive relief from further warrantless entries. We review the grant of permanent injunctive relief for an abuse of discretion. *Transgo, Inc. v. Ajac Transmission Parts, Corp.*, 768 F.2d 1001, 1021-22 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986). The relief will be upheld when "those against whom [it] is issued ... receive fair and well-defined notice of what the injunction prohibits." *Id.* at 1022. The district court granted the relief based upon its finding, unchallenged on appeal, that the City had violated the Conners' right to be free from unreasonable searches and seizures.

The City argues that the injunction is too vague as it prohibits warrantless entries onto the "curtilage of plaintiffs' home or homes". The City argues that the word "curtilage" renders the injunction impermissibly vague. We cannot agree. The meaning of curtilage may not be exact; it does, however, give sufficient notice to the City. *See United States v. Dunn*, 480 U.S. 294, 301 & n.4 (1987) (curtilage includes areas which harbor intimate activities of domestic life, usually to include fenced-in areas of property). The City also argues, in essence, that the injunction impermissibly encroaches upon their police power to make warrantless searches. We disagree. U.S. Const. amend IV.

We find no abuse of discretion and affirm the district court's grant of injunctive relief.

Attorney Fees

The City and the Conners contend that the amount of fees awarded was an abuse of discretion. *See Cunningham v. County of Los Angeles,* 879 F.2d 481, 483 (9th Cir. 1989) (fee awards are reviewed for an abuse of discretion), *cert. denied,* 110 S. Ct. 757 (1990). The district court thoroughly and exhaustively considered the fee application and considered all factors relevant to the award of fees under § 1988. *See id.,* 879 F.2d at 484-89 (setting forth standards applicable to fee determinations). The district court reduced by 40% the total number of hours awarded to reflect only partial success on the merits. The City contends that the district court incorrectly assessed fees against it and that the 40% reduction was too small.[10] The Conners' attorney argues that the reduction was too great. We disagree and conclude that the district court's careful consideration of all relevant factors produced an award of fees well within its discretion. Accordingly, we affirm the grant of fees.[11]

The City and the Conners seek fees for this appeal. We deny the City's request for fees because the Conners' unsuccessful claims were not frivolous, unreasonable or without foundation. *See Jensen v. City of San Jose,* 806 F.2d 899, 901 (9th Cir. 1986) (en banc) (where plaintiff's claims are not frivolous no fees are to be awarded to

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[10]The City incorrectly argues that the district court improperly allowed fees for administrative proceedings. *See Webb v. Dyer County Board of Education,* 471 U.S. 234 (1985) (district court has discretion to award such fees).

[11]Further fees would of course be proper if the Conners prevail on the claim remanded for trial.

defendant); *Boatowners and Tenants Association v. Port of Seattle,* 716 F.2d 669, 674 (9th Cir. 1983) (same).

We award fees to the Conners' attorney for the issues on which the Conners have succeeded on the merits in this appeal. They have not succeeded on the merits on the issues to be reversed and remanded for further proceedings. *See Procter v. Consolidated Freightways Corp.,* 795 F.2d 1472, 1478-79 (9th Cir. 1986). They have, however, succeeded on the merits in *defending* the appeal with regard to: 1) the damages awarded, 2) the injunctive relief, and 3) the attorney fee award. Fees are appropriate for the time expended on appeal on those issues. *Chalmers v. County of Los Angeles,* 796 F.2d 1205, 1213 (1986), *amended in unrelated part,* 808 F.2d 1373 (9th Cir. 1987).

Counsel shall file a properly supported fee application detailing the hours expended on appeal upon the foregoing three issues. That fee application shall be submitted to the clerk of this court on or before [thirty days from filing]. Objections thereto, if any, shall be filed fifteen days thereafter.

Conclusion

The district court is reversed on the grant of summary judgment regarding the June 7, 1985 warrantless search and seizure and on the grant of summary judgment to the nonmunicipal defendants on the ground that they were entitled to qualified immunity. We affirm the district court on all other challenges. Accordingly, we remand to the district court for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

TROTT, Circuit Judge, dissenting:

I respectfully believe the majority opinion elevates form over substance. Guided by the text of the Fourth Amendment, its purpose, and the time honored method of determining which warrantless searches and seizures are "reasonable" and which are not, I find no unreasonable search or seizure with respect to the warrantless entry after pre-abatement adversary hearings. Nor do I find any invasion of privacy. The lack of a case squarely on point blessing what happened here does not mean it cannot be proper; it only means that we must use analysis to decide this case, not round pegs and round holes. Moreover, the opinion raises problems with regard to the doctrine of qualified immunity.

THE SEARCH AND SEIZURE

The majority opinion appears fixated on what the police did not have (a warrant) when it should be examining both what the City did and what the Conners received in terms of process before the second entry. Instead, the majority opinion contains a statement that I find extraordinary under the circumstances of this unusual case: "... [the second entry and seizure violated the Fourth Amendment] regardless of how 'reasonble' the warrantless search and seizure appeared in light of the extensive pre-seizure process afforded the Conners." Majority opinion at p. 2304. This to me is tatamount to sweeping all the constitutional pieces off the chess board without following the rules of the contest. When you step back from the trees and and look at the forest, it becomes clear that the values designed to be protected by the Fourth Amendment were undisturbed by what the city did—and how it did it—in this case. A warrant—and the process used to attain it—would have added nothing to the Conner's

privacy in the light of the equivalent substitute process they did receive, or to the independent review to which they were entitled.

I do not quarrel with a finding that the initial July 1, 1983 warrantless entry for the purpose of *inspecting* the alleged nuisance was improper and a violation of the constitutional right to be free of illegal searches and seizures. But with respect to the warrantless second entry on June 7, 1985, I agree with the district court's reasoning, which was set forth in a thoughtful and informed Statement of Uncontroverted Facts and Conclusions of Law a follows:

> 8. As the [c]ourt noted at the June 29, 1987 hearing, the legality of the June 7, 1985 entry is more problematic. At that point, pre-abatement hearings had been held and the vehicles had actually been found to be public nuisances. The officers and tow truck operators entered plaintiffs' property solely to abate the previously declared nuisances. It is this crucial distinction between the first and second entries that troubled the [c]ourt and caused it to require further briefing.
>
> After thorough consideration of the issue, the [c]ourt now determines that the July 7, 1985 entry to abate the nuisances did not violate plaintiffs' constitutional rights.
>
> As stated above, the [c]ourt recognized that citizens have a right to be free from unauthorized

searches and seizures in their enclosed backyard. However, that does not mean that in a case where there has been notice, pre-abatement hearings, appeal procedures, and (under California law) the right to seek review in the [c]ourt system, those rights of the plaintiffs are violated merely because a warrant was not obtained prior to the entry to carry out the order of abatement. An entry for the purpose of carrying out an abatement cannot be said to be unreasonable under these circumstances. Indeed, to require a warrant after all of the above procedures have taken place would impose untoward burdens upon local government as well as the courts. This does not mean that a court should set aside the Constitution whenever it interferes with what some would consider to be efficient governmental operations, but it is surely not reasonable to require a warrant to abate every nuisance (for example, weeds, trash and wrecked cars) where the citizens involved have already had a full and fair procedure wherein they had the opportunity to contest the need and propriety of the abatement in their specific case.

Cases that deal with an entry to determine whether a nuisance exists on the property, *e.g.*, *Gleaves v. Waters*, 175 Cal.App. 3d 413 (1985), are not the same as this one. To allow entries into backyards for the purpose of inspecting the premises to find nuisances would effectively repeal the protections of the Fourth Amendment. However, that is not the situation where, as here, the presence of the nuisance is known, and has actually been determined in hearings that gave the citizen the full right to protect his interests and the opportunity to voluntarily abate the nuisance.

> Therefore, the [c]ourt determines that when the public officials entered the plaintiffs' backyard to abate a known, visible, nuisance after first conducting the extensive pre-abatement procedure used here, they did not commit an illegal search and seizure. Again, it should be clear that this decision is not intended to indicate there is no Fourth Amendment protection in one's enclosed backyard. Nor does the [c]ourt decide that it would be proper to forceably enter a house to abate what might be a nuisance located within the actual confines of the house. The [c]ourt only holds that the entry in this case did not violate the Fourth Amendment. Therefore, summary judgment should be, and is GRANTED for defendants on that issue.

An illegal search within the meanings of the Fourth Amendment occurs whenever one's reasonable expectation of privacy is violated by unreasonable governmental intrusion. *Katz v. United States*, 389 U.S. 347, 353 (1967). As was stated by the Supreme Court, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against *arbitrary* invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (emphasis added).

The reasons justifying a determination that the first entry violated the Fourth Amendment — reasonable expectations of privacy — do not appear to apply to the second entry and seizure. At the time of the second entry, there had been two years of notice, two pre-abatement hearings, appeal procedures, and the right to seek review in the state court system. At each step of the way, it was determined that a nuisance indeed existed, and that it was to be abated.

The second entry onto the Conners' property for the specific purpose of abating the nuisance was, in my view, neither unreasonable nor arbitrary. The Conners, or any other reasonable person, had to have seen it coming: the handwriting was on the wall. Regardless of what the Conners' subjective expectations may have been at that point, no reasonable privacy interests can be said to have remained. *See Michigan v. Clifford*, 464 U.S. 287, 292 (1984) ("The test essentially is an objective one").

The majority opinion seems to imply that a judicial warrant is required whenever an entry is made to abate an established nuisance irrespective of the underlying circumstances. Despite intensive research, I have been unable to uncover a case, state or federal, that supports directly that proposition. Dicta in *Michigan v. Tyler*, 436 U.S. 499 (1978) on which the proposed opinion largely relies, certainly is not supportive of the proposition. *See id.* at 504 ("Their purpose may be to *locate and abate* a *suspected* public nuisance . . . .") (emphasis added).

Indeed, California itself recognizes that a warrant is not necessarily required whenever governmental officials engage in the abatement of a nuisance:

> We do not mean to suggest or imply that the warrant requirement extends to all entries onto private property for nuisance abatement purposes, only those which infringe upon constitutionally recognized expectations of privacy.

Gleaves v. Waters, 175 Cal. App. 3d 413, 220 Cal. Rptr. 621, 625 (1985).

The view that, irrespective of the extensiveness of due process accorded people similarly situated to the Conners, a judicial authorization *must* be obtained prior to the enforcement of a City Council's nuisance determination

does not appear to be sound. To begin with, under the exercise of its police power, "a local legislative body may enact and enforce police ordinances to regulate or prohibit a thing or act of such nature that it may become a nuisance or may be injurious if not regulated or abated." Rhyne, *The Law of Local Government Operations* § 19.27, at 472 (1980); *see also Sullivan v. Los Angeles Dept. of Bldg. & Safety*, 116 Cal. App. 2d 807, 254 P.2d 590, 592 (1953) ("the exercise of the police power is not limited to the regulation of such things as have already become nuisances or have been declared to be such by the judgment of a court").

Secondly, I tend to agree with the district judge that requiring judicial authorization of an abatement determination "would impose untoward burdens upon local governments as well as the courts." *See Shadwick v. City of Tampa*, 407 U.S. 345, 353 (1972) ("Communities may have sound reasons for delegating the responsibility of issuing warrants to competent personnel other than judg or lawyers").

Third, in the Fourth Amendment context, the purpose of review by a "judicial officer" prior to issuance of a warrant is to "insure that the deliberate, impartal judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). There is nothing in the record to suggest that the city council — which is part of the legislative, not executive, branch of government — was anything but competent, impartial, neutral and detached. The hearings before the city council most assuredly constituted an adequate buffer between the municipal police officers and the Conners. For all practical purposes, the

conclusion that a nuisance existed in violation of municipal law, and was therefore subject to abatement pursuant to the governmental power of the municipality, was "judicially" determined. Moreover, an application for a search warrant is ex parte. The subject is never asked for his side of the story. In this sense, the Conners enjoyed an opportunity not available to the usual "suspect." As I stated at the outset, I am concerned that the majority's opinion elevates form over substance.

QUALIFIED IMMUNITY

I can agree with the majority opinion that the grant of qualified immunity as to the *initial* entry was erroneous. The mere absence of a provision in the municipal code requiring a warrant for inspecting suspected nuisances does not necessarily mean that the failure to obtain one was objectively reasonable, particularly in light of *Tyler*. *See Gleaves v. Waters,* 220 Cal. Rptr. at 625 ("The constitutional requirement of a warrant is not of course dependent upon the enactment by the legislature of an implementary procedure").

Even assuming, however, that the second entry and seizure violated the warrant requirement of the Fourth Amendment, I cannot find the individual qualifying defendants not entitled to qualified immunity. In the absence of specific case law on the subject, it seems wholly inappropriate to hold that a warrant requirement under the unusual circumstances of the second entry was "clearly established." *Anderson v. Creighton,* 483 U.S. 635 (1987). *Anderson* explained this doctrine as follows:

> When government officials abuse their offices, "action[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald,* 457 U.S., at 814 [457 U.S. 800

(1982)]. On the other hand, permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties. *Ibid.* Our cases have accommodated these conflicting concerns by generally providing government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonable have been thought consistent with the rights they are alleged to have violated. Somewhat more concretely, whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, *Harlow,* 457 U.S., at 819, assessed in light of the legal rules that were "clearly established" at the time it was taken, *id.,* at 818.

The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow.* Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified

> liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis, supra* at 195 [*Davis v. Scherer*, 468 U.S. 183, 195 (1984)] .... The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that *in the light of pre-existing law* the unlawfulness must be apparent.

483 U.S. at 638-640 (citations omitted) (footnote omitted) (emphasis added).

The Supreme Court calls upon us in *Davis v. Scherer*, 468 U.S. 183, 196 (1984), to recognize the demands of the real world in measuring activity by members of the executive branch:

> Nor is it always fair, or sound policy, to demand official compliance with statute and regulation on pain of money damages. Such officials as police officers or prison wardens, to say nothing of higher level executives who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to a plethora of rules,

> "often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively." See P. Schuck, Suing Government 66 (1983). In these circumstances, officials should not err always on the side of caution. "[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."

Today we fail to give that message due consideration. Instead, we subject officials to a trial under circumstances where four federal judges disagree as to whether what they did violated the Constitution, and we do so in an area of the law that has not been squarely addressed by this circuit. How we can say that the law they violated was "clearly established" at a particularized level escapes me.

I respectfully DISSENT.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Dale Conner and LINDA CONNER,
Plaintiffs,
vs.
CITY OF SANTA ANA, et al.
Defendants.

CV 85-7918 FFF

Filed August 6, 1987

Clerk U.S. District Court
Central District of California
by Chin, Deputy

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW

This matter came on for hearing on June 29, 1987 on several motions for summary judgment filed by plaintiffs and the defendants before the Honorable Ferdinand F. Fernandez, United States District Judge, presiding.

The Court has considered the papers, evidence and argument of the parties and hereby enters the following Statement of Uncontroverted Facts and Conclusions of Law.

STATEMENT OF UNCONTROVERTED FACTS

1. Plaintiffs Dale and Linda Conner are residents of the City of Santa Ana.

2. Defendant City of Santa Ana is a California municipal corporation.

3. Defendant Robert Bobb is the City Manager of the City of Santa Ana.

4. Defendant Edward J. Cooper is the City Attorney of the City of Santa Ana.

5. Defendant Raymond C. Davis is the Chief of Police for the City of Santa Ana.

6. Defendant C. R. Miller is a Captain of Police for the City of Santa Ana.

7. Defendant Greg Cooper is a Lieutenant of Police for the City of Santa Ana.

8. Defendant Lewis Garcia is a Abatement Officer for the City of Santa Ana.

9. Defendant Ken Hall is a Lieutenant of Police for the City of Santa Ana.

10. Defendant Richard Bowers is a Sergeant of Police for the City of Santa Ana.

11. Defendant Dan Felix is a Sergeant of Police for the City of Santa Ana.

12. Defendants Cabrerra, Vedborg, Taylor, Zavala, and S. Despenas are Police Officers for the City of Santa Ana.

13. Defendant Yancy's Body Shop, Inc., dba California Towing, is a California corporation doing business in the City of Santa Ana.

14. Defendants Fred Keen and Albert Watson dba A & P Santa Ana.

15. In March, 1983 the City of Santa Ana began receiving complaints from neighbors about inoperative vehicles on plaintiffs' property.

16. Defendant Garcia was assigned to investigate the complaints. He went to the plaintiffs' residence and observed several vehicles in the driveway, street and backyard. Garcia spoke with Mr. Conner and advised him that the Santa Ana Municipal Code prohibited him from storing inoperative vehicles outside his home. Garcia told Mr. Conner that the Municipal Code required that he either store the vehicles inside a building, or put them in running condition.

17. Garcia returned to the plaintiffs' residence on June 30, 1983 and saw that there had been no compliance with his request.

18. The next day, July 1, 1983, Garcia returned with defendant Bower and several other of the defendant police officers. Mrs. Conner was home, Mr. Conner was not.

19. Defendant Garcia told Mrs. Conner that he intended to go into plaintiffs' enclosed backyard to obtain the vehicle identification numbers ("VIN") of the cars that were stored there.

20. At that point, Mrs. Conner demanded to see a warrant and stated she would not let anyone into the backyard without one. Nevertheless, Garcia, at the direction of Bower, went to the rear of the backyard and, without a warrant, climbed over the fence and began to write down VIN and license plate numbers of the vehicles stored in the yard.

21. Defendant Cabrerra joined Garcia in the backyard to assist in the search. All told, the officers were in the

yard approximately 15 minutes. Mrs. Conner turned sprinklers on to try and force them to leave.

22. Later that same day (July 1, 1983), letters of abatement were sent to the plaintiffs on five vehicles stored in the backyard.

23. In accordance with the Municipal Code, plaintiffs appealed to defendant Davis for a hearing on the abatement notices. A hearing was set for July 29, 1983 before defendant Hall.

24. The plaintiffs objected to defendant Hall being the hearing officer. Accordingly, Hall was replaced with defendant Greg Cooper and the hearing was continued to August 5, 1983.

25. On August 5, 1983, the hearing was continued to August 17, 1983 because Mr. Conner was ill. On August 17, 1983 plaintiffs requested another continuance due to the fact Mr. Conner was incarcerated.

26. Defendant Cooper denied the request and held the hearing with Mrs. Conner and counsel present. Cooper traveled to the plaintiffs' residence to view the vehicles in question. He then found that each of them was a public nuisance and thus subject to the abatement procedures of the Santa Ana Municipal Code.

27. On August 29, 1983 plaintiffs appealed Cooper's decision to the Santa Ana City Council. The Council appointed Hearing Officer Harold Swatez to conduct a hearing and file a written recommendation.

28. Swatez conducted seven days of hearings spread throughout a period from April 20, 1984 to October 12, 1984. Final arguments were heard from both sides and the matter stood submitted on December 27, 1984.

29. Shortly thereafter, Swatez issued his recommendation. Specifically, he found that:

> . . . It would appear that the actions of the SAPD were within the provisions of the Santa Ana Municipal Code. However, to maintain harmony between the City of Santa Ana and its citizens, it would appear to be in everyone's interest to allow the appellants one final opportunity to prove the cars operable and/or to obtain a building permit and construct an enclosure for the above subject vehicles.

30. On February 19, 1985, the City Council adopted the Swatez recommendation. In other words, the Council found that the actions of the Police Department had been within the provisions of the Municipal Code, but that the plaintiffs be given 30 days to prove the vehicles operable or build an enclosure for them.

31. The plaintiffs did not avail themselves of this opportunity. Accordingly, on June 7, 1985 defendants California Towing and A & P Towing were called and told to meet with several of the defendant officers at a park near the plaintiffs' residence. The group then proceeded to the Conner residence, where they were joined by several individuals from the Santa Ana Maintenance Department.

32. The police officers and tow truck operators stood by while the Maintenance personnel proceeded to remove a sufficient portion of the fence enclosing plaintiffs' backyard to provide access to the stored cars.

33. The officers and tow trucks then went into the backyard, again without a warrant, and removed a 1968 Chevrolet and a 1968 Oldsmobile. The fence was then reassembled.

34. The vehicles were taken to the lots of A & P and California Towing, where several days later they were destroyed.

35. In pertinent part, the Santa Ana Municipal Code provides as follows:

Sec. 16-113. Administration and enforcement

> . . . In the enforcement of this article, such officer and his deputies may enter upon private or public property to examine a vehicle or parts thereof, or obtain information as to the identity of a vehicle and to remove or cause the removal of a vehicle or parts thereof declared to be a nuisance pursuant to this article.

Sec. 16-114. Authority to remove

> When the Chief of Police has arranged with any person or persons, to accomplish the removal of a vehicle or parts pursuant to this article, such person or persons shall be authorized to enter upon private property or public property for such purpose.

Sec. 16-117. Notices of intention to abate and remove; mailing; form of notices.

> A ten-day notice of intention to abate and remove the vehicle, or parts thereof, as a public nuisance shall be mailed by registered or certified mail to the owner of the land and to the owner of the vehicle, . . .

Sec. 16-118. Public hearing — Request by owner of vehicle or owner of land.

> Upon request by the owner of the vehicle or owner of the land . . . a public hearing shall be held by the Chief of Police or his designee on the question of abatement and removal of the vehicle, or parts

thereof, as an abandoned, wrecked, dismantled or inoperative vehicle . . .

Sec. 16-119. Same — Conduct; rules of evidence; appearance or statement of owner of land; determination by hearing officer; order, notice of decision.

. . . At the conclusion of the public hearing, the Chief of Police or his designee may find that a vehicle or parts thereof have been abandoned, wrecked, dismantled, or is inoperative on private or public property and order the same removed from the property as a public nuisance and disposed of as hereinafter provided . . . The order requiring removal shall include a description of the vehicle or parts thereof and the correct identification number and license of the vehicle, if available at the site.

Sec. 16-121. Disposition of vehicle after order of appeal.

Five (5) days after adoption of the order declaring the vehicle or parts thereof to be a public nuisance, five (5) days from the date of the mailing of notice of the decision of such notice is required by this article, or fifteen (15) days after such action of the City Council authorizing removal following appeal, the vehicle or parts thereof may be disposed of by removal to a scrap yard or automobile dismantlers' yard. After a vehicle has been removed, it shall not thereafter be reconstructed or made operable.

36. Plaintiffs filed the instant action on December 5, 1985. The Complaint states that it is being brought pursuant to 42 U.S.C. §§ 1983, 1985 and 1986.

37. Plaintiffs did not segregate the Complaint into separate causes of action. Thus, the Complaint is not

precisely clear as to what claims are being pled. It appears, however, that plaintiffs allege that defendants' conduct has deprived them of the following constitutional rights:

(a) The right to be secure in their person and effects against unreasonable searches and seizures under the Fourth and Fourteenth

(b) The right not to be deprived of life, liberty or property without due process of law, and the right to the equal protection of the laws, under the Fifth and Fourteenth Amendments.

and

(c) The right to freedom of expression, and the right to petition the government for redress of grievances under the First Amendment.

38. The matter is now before the Court on motions for summary judgment filed by plaintiffs, the City defendants, A & P Towing and California Towing.

39. The motions were heard by the Court on June 29, 1987. At that time, the Court indicated that the quantity and quality of the papers filed on the motions left a great deal to be desired. Nevertheless, the Court waded through the morass and issued tentative rulings in several areas. The Court then ordered the parties to submit supplemental briefing on the narrow issue of whether a warrantless entry into a backyard to abate a nuisance is constitutional where there has been prior notice and a pre-abatement hearing in which the nuisance has been declared.

40. Those papers have now been filed and the Court has reviewed and considered them in issuing the within findings of fact and conclusions of law.

41. Any statement of fact inappropriately designated as a conclusion of law is incorporated herein.

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1343.

2. The Court has personal jurisdiction over the parties. Venue is proper in this district.

3. It is apparent that plaintiffs' claim under 42 U.S.C. § 1985 is without merit. In order to recover on a claim under § 1985, a plaintiff must plead and prove that a racial or other class-based discriminatory animus is motivating the alleged actions. *United Brotherhood of Carpenters v. Scott,* 463 U.S. 835, 103 S.Ct. 3352 (1983). Here, plaintiffs present no evidence whatsoever of any such discrimination. Accordingly, summary judgment is hereby *GRANTED* for defendants on plaintiffs' claim under 42 U.S.C. § 1985. *See e.g., Rodgers v. Lincoln Towing Service,* 596 F.Supp. 13, 21 (N.D. Ill. 1984) ("Even if the statute [§ 1985] does extend somewhat beyond strictly racial classes, it clearly does not apply where there is no discreet, insular class defined by invidious criteria, but only an amorphous ill-defined group of people who share no common characteristic save a penchant for parking their cars where they may get towed away.")

4. Liability under 42 U.S.C. § 1986 depends on the existence of a valid claim under § 1985. *Mollnow v. Carlton,* 716 F.2d 627 (9th Cir. 1983). Accordingly, summary judgment for defendants is also *GRANTED* on plaintiffs' claim under § 1986.

5. Plaintiffs' claim for violation of First Amendment rights is meritless. There is absolutely no principle that allows an individual to convert ownership of several old

automobiles into a lofty assertion of constitutionally guaranteed free speech. If that were the case, then the First Amendment would be trivialized and would ultimately be "discredited by being overdone." *Douglas v. City of Jeannette,* 319 U.S. 157, 181, 63 S.Ct. 882, 889 (1943) (Jackson, J., concurring). Accordingly, summary judgment is *GRANTED* for defendants on plaintiffs' claim based upon the First Amendment.

6. Plaintiffs' procedural due process claim is also without merit. Plaintiffs were given two pre-abatement hearings, with the second one running for several days. Subsequent to the hearings, plaintiffs still refuse to comply with the law and refused the City's invitation to make the vehicles operable. Moreover, plaintiffs declined to avail themselves of Cal. Civ. Proc. Code § 1094.5, a yet further avenue of review available to them.

Plaintiffs' attempt to attach significance to the fact a hearing was not provided after the vehicles were removed is without merit. Cases such as *Parks v. "Mr. Ford",* 556 F.2d 132 (3rd. Cir. 1976) are easily distinguishable from the facts of this case. For instance, in *Parks,* the Pennsylvania statute permitted the owner to be permanently deprived of his vehicle without any hearing whatsoever. Here, several days of hearings were conducted prior to the nuisances being abated. In short, plaintiffs clearly received all the process they were due. Nothing further was required under the Constitution after the vehicles were removed from the backyard. Summary judgment for defendants is therefore *GRANTED* on plaintiffs' procedural due process claim.

7. As for the Fourth Amendment claims concerning the two entries into plaintiffs' backyard, the Court grants summary judgment for plaintiffs on the July 1, 1983 entry to obtain VIN numbers.

It has long been established that entries onto private property to search for a suspected nuisance are governed by the warrant requirement of the Fourth Amendment. *Michigan v. Tyler,* 436 U.S. 505, 98 S.Ct. 1042 (1978); *Camara v. Municipal Court,* 387 U.S. 530, 87 S.Ct. 1727 (1967). Thus, where there is a legitimate privacy interest in the property entered, a warrantless and non-consensual entry is permissible only where exigent circumstances justify the intrusion. *Michigan v. Clifford,* 464 U.S. 287, 104 S.Ct. 641 (1984).

Here, it is most surprising to see the defendants suggest that plaintiffs did not have a legitimate expectation of privacy in their enclosed backyard. While the question of how far the curtilage of the home extends is open to debate, it surely extends to an enclosed backyard. *See e.g., Fixel v. Wainwright,* 492 F.2d 480, 483 (5th Cir. 1974) (quoting the Webster's Dictionary definition of curtilage as the "yard, courtyard or other piece of ground included within the fence surrounding a dwelling house."); *see also, United States v. Dunn,* U.S. , 107 S.Ct. 1134, 1139 n.4 (1987) (government itself acknowledges that the curtilage extends to the "nearest fence surrounding a fenced house.").

Accordingly, the July 1, 1983 warrantless entry by officers Garcia and Cabrerra, at the direction of Sergeant Bower, was improper and constituted a violation of plaintiffs' constitutional right to be free of illegal searches and seizures. Summary judgment for plaintiffs is therefore *GRANTED* on that claim. As will appear below, this is only against the City of Santa Ana.

8. As the Court noted at the June 29, 1987 hearing, the legality of the June 7, 1985 entry is more problematic. At that point, pre-abatement hearings had been held and the vehicles had actually been found to be public nuisances.

The officers and tow truck operators entered plaintiffs' property solely to abate the previously declared nuisances. It is this crucial distinction between the first and second entries that troubled the Court and caused it to require further briefing.

After thorough consideration of the issue, the Court now determines that the July 7, 1985 entry to abate the nuisances did not violate plaintiffs' constitutional rights.

As stated above, the Court recognizes that citizens have a right to be free from unauthorized searches and seizures in their enclosed backyard. However, that does not mean that in a case where there has been notice, pre-abatement hearings, appeal procedures, and (under California law) the right to seek review in the Court system, those rights of the plaintiffs are violated merely because a warrant was not obtained prior to the entry to carry out the order of abatement. An entry for the purpose of carrying out an abatement cannot be said to be unreasonable under these circumstances. Indeed, to require a warrant after all of the above procedures have taken place would impose untoward burdens upon local governments as well as the courts. This does not mean that a court should set aside the Constitution whenever it interferes with what some would consider to be efficient governmental operations, but it is surely not reasonable to require a warrant to abate every nuisance (for example, weeds, trash and wrecked cars) where the citizens involved have already had a full and fair procedure wherein they had the opportunity to contest the need and propriety of the abatement in their specific case.

Cases that deal with an entry to determine whether a nuisance exists on the property, *e.g., Gleaves v. Waters,* 175 Cal.App. 3d 413 (1985), are not the same as this one. To allow entries into backyards for the purpose of in-

specting the premises to find nuisances would effectively repeal the protections of the Fourth Amendment. However, that is not the situation where, as here, the presence of the nuisance is known, and has actually been determined in hearings that gave the citizen the full right to protect his interests and the opportunity to voluntarily abate the nuisance.

Therefore, the Court determines that when the public officials entered the plaintiffs' backyard to abate a known, visible, nuisance after first conducting the extensive pre-abatement procedure used here, they did not commit an illegal search and seizure. Again, it should be clear that this decision is not intended to indicate there is no Fourth Amendment protection in one's enclosed backyard. Nor does the Court decide that it would be proper to forceably enter a house to abate what might be a nuisance located within the actual confines of the house. The Court only holds that the entry in this case did not violate the Fourth Amendment. Therefore, summary judgment should be, and is *GRANTED* for defendants on that issue.

9. Finally, the Court determines that the individual defendants are entitled to qualified immunity from liability for the unconstitutional search and seizure on July 1, 1983.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 2738 (1982). In other words, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malloy v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986). With respect to unconstitutional warrantless

searches, the Supreme Court decided this past term that the officers conducting the search are entitled to qualified immunity as long as their belief that the search was proper was objectively reasonable. *Anderson v. Creighton,* ____ U.S. ____, 55 U.S.L.W. 5092 (June 25, 1987).

Here, the Court finds that the belief of defendants Garcia, Cabrerra and Bower that a warrant was not necessary before entering plaintiffs' yard to obtain the VIN numbers was objectively reasonable. Section 16-113 of the Municipal Code gave the defendants the apparent authority to do exactly what they did; that is, enter the backyard without a warrant to obtain identifying information.[1]

The fact this Court questions the constitutionality of that section as applied to the entry in question does not control the immunity issue. *Cf., Illinois v. Krull,* ____ U.S. ____, 107 S.Ct. 1160 (1987) (the exclusionary rule does not apply to evidence obtained by police acting on objectively reasonable reliance on a statute authorizing warrantless searches even if the statute is later found to be unconstitutional).

The Court acknowledges that at first blush *Freeman v. Blair,* 793 F.2d 166 (8th Cir. 1986) appears to support plaintiffs' position that defendants should not be granted immunity in this case. *Freeman,* however, involved an attempted warrantless search of a campground with no probable cause whatsoever to suspect that any unlawful acts were being conducted on the grounds. In the instant case, the violations were already known to the officers before the entry was made. The purpose of the search was to obtain identification numbers. Moreover, the authoritative value of *Freeman* is severely undermined by subsequent Supreme Court authority. *See e.g., Anderson v. Creighton, supra; New York v. Burger,* 55 U.S.L.W. 4890

(June 19, 1987). Finally, to the extent *Freeman* is applicable, this Court respectfully disagrees with its determination.

10. If it were decided that the search and seizure of June 7, 1985 was also unconstitutional, the principles set forth in paragraph 9 apply even more strongly to that incident. As the Court pointed out in paragraph 8, the law is far from clear. Surely, the individuals and entities who participated in that incident cannot be said to be knowing violators of the law.

11. Accordingly, all defendants except the City of Santa Ana are immune from liability and summary judgment is therefore *GRANTED* in their favor.

12. In sum, this case shall proceed on a Section 1983 claim by the plaintiffs against the City of Santa Ana for damages caused by the unconstitutional entry into plaintiffs' backyard on July 1, 1983.[2] Summary judgment is *GRANTED* for the other defendants in all other respects.[3]

13. Any conclusion of law inappropriately designated as a statement of fact is incorporated herein.

14. The Court incorporated its comments from the bench on June 29, 1987 as a further explanation of its determinations.

15. Defendants shall prepare an appropriate form of Order and Judgment and serve it and file it in accordance with Local Rule 14.

DATED: August 6, 1987

FERDINAND F. FERNANDEZ

FERDINAND F. FERNANDEZ
United States District Judge

FOOTNOTES

1. *See also,* Restatement (Second) of Torts § 202. "A public officer who by virtue of his office or by statute is authorized to abate a public nuisance, is privileged, at a reasonable time and in a reasonable manner, to enter land in the possession of another for the purpose of abating such a nuisance."

2. Proof of a single incident of unconstitutional activity is sufficient to impose liability against a municipality under *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, where the incident was caused by an existing unconstitutional municipal policy. *City of Oklahoma City v. Tuttle,* 471 U.S. 808, 105 S.Ct. 2427 (1985).

3. Obviously, this does not apply to the following parties who have already settled with the plaintiffs: Fred Keen and Albert L. Waston dba A & P Towing, A & P Towing and/or Santa Ana Towing dba A & P Towing. (Order of Dismissal filed August 5, 1987).

Dated: August 6, 1987